

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY BUCKLE,

Defendant-Appellant.

UNPUBLISHED

April 17, 2003

No. 233760

Wayne Circuit Court

LC No. 00-006437-01

Before: Meter, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of two counts of unarmed robbery, MCL 750.530, for which the trial court sentenced him to concurrent terms of seven to fifteen years' imprisonment. We affirm.

Defendant first argues that his Fifth Amendment rights were violated by the prosecutor's improper introduction at trial of defendant's post-*Miranda*¹ silence and demeanor. We disagree.

This Court's review of alleged prosecutorial misconduct is generally precluded in the absence of objection because the trial court was deprived of the opportunity to cure the alleged error. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). In any event, a defendant's unpreserved claim of prosecutorial misconduct is reviewed for plain error, as is a defendant's unpreserved claim of constitutional error. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

A defendant's exercise of his right to silence may not be used against him at trial. *People v Taylor*, 245 Mich App 293, 304; 628 NW2d 55 (2001). Use of a defendant's post-*Miranda* silence violates the defendant's constitutional right to due process for two reasons: (1) a defendant's post-*Miranda* silence is ambiguous – rather than an implicit admission of guilt, a defendant's silence could represent his exercise of the very right of which he was advised, and (2) the *Miranda* warning alerting the defendant to his right to remain silent carries an implicit assurance that no penalty will result if the defendant exercises this right. *People v Dennis*, 464 Mich 567, 573-574; 628 NW2d 502 (2001).

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 694 (1966).

Here, however, defendant's decision not to elaborate on his acquaintance with Jamel Brown and defendant's accompanying demeanor did not rise to the level of silence having constitutional implications. After the waiver of *Miranda* rights, a defendant's statements, the manner in which the defendant phrased the statements, and the defendant's "varying degrees of candor" are matters appropriate for jury consideration. *People v Scholl*, 453 Mich 730, 738; 556 NW2d 851 (1996). Like the situation in the instant case, the Court in *Scholl* noted that the defendant was "generally prepared to talk with the police," and defense counsel did not object to the testimony's admission at trial. *Id.* at 738. Moreover, if a defendant, as did defendant here, waived his right to remain silent, voluntarily answered a police officer's questions, and was later unresponsive to the officer's questions, there is no basis to conclude that the defendant's unresponsiveness indicates his invocation of the right to remain silent. *People v McReavy*, 436 Mich 197, 202-203; 462 NW2d 1 (1990). Thus, we find no error involving the prosecutor's use at trial of defendant's partial silence and demeanor during his police interview.

Defendant next contends that he was denied a fair trial by the prosecutor's reference during closing statements to defendant's alleged change in demeanor during the police interview when the investigating officer asked him about Jamel Brown. We disagree.

The prosecutor may remark on the evidence admitted at trial and all reasonable inferences that can be drawn from the evidence as they relate to the prosecutor's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor may argue from the facts that a defendant is not believable. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Because evidence of defendant's demeanor and unresponsiveness after he waived his *Miranda* rights was admissible, the prosecutor's proper use of that evidence during rebuttal argument was not erroneous. Moreover, a prosecutor may draw reasonable inferences from the evidence admitted at trial and argue that those inferences indicate a defendant's guilt. See *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998).

Defendant next argues that he was denied a fair trial when a witness was permitted to testify about defendant's purchase of marijuana. We disagree.

The admission or exclusion of evidence is within the trial court's discretion and should be reversed only where there is a clear abuse of that discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Because defense counsel did not timely object to the testimony at trial, the issue was not properly preserved for appellate review. An unpreserved nonconstitutional error is presumed harmless and does not merit reversal unless it is more probable than not that the error was outcome-determinative. MCL 769.26; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Our review of the record does not indicate that the witness' testimony had any effect on the outcome of trial. Any error in admitting the evidence was harmless in light of the other admissible and overwhelming evidence presented at trial. *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).

Defendant finally contends that he was denied the effective assistance of counsel by his attorney's failure to object to the admission of the evidence involved in the issues previously discussed. We disagree.

This Court's review of a defendant's unpreserved claim of ineffective assistance of counsel is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d

502 (2000). A reversal based on ineffective assistance of counsel is justified if a defendant affirmatively shows that his counsel's performance fell below an objective standard of reasonableness and prejudiced him to the extent that he was denied a fair trial. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). He must show that actual prejudice resulted from his counsel's ineffectiveness – in other words, he must show a reasonable probability that the result of his trial would have differed had his counsel not erred. *People v Murray*, 234 Mich App 46, 65; 593 NW2d 690 (1999).

In light of this Court's disposition of defendant's other issues, any evidentiary objections by defendant's attorney would have been futile, and counsel is not required to advocate a meritless position. *Snider, supra* at 425.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper